98-755

No.

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1998

EMILE HADDAD,

Petitioner,

v.

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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30pp

QUESTIONS PRESENTED FOR REVIEW

Question 1: Whether Petitioner's age discrimination case grounded on direct evidence was improperly adjudicated by the district and Fourth Circuit courts in a manner inconsistent with relevant decisions of this Court and other circuit courts of appeal, as specified in the following subsidiary questions:

(a) What is the proper paradigm for adjudicating individual disparate treatment single-motive claims grounded on direct evidence, an unsettled question arising from this Court's 1985 *Thurston* holding, and generating since conflicting decisions among the circuits; and accordingly,

(b) whether the Fourth Circuit's paradigm for adjudicating said direct evidence claims is proper; and whether Petitioner was denied a substantial right at every stage of the adjudication of his claims under said paradigm; specifically,

(c) whether the Fourth Circuit Court of Appeals erred by affirming the district court orders (i) granting defendant partial summary judgement, (ii) denying plaintiffs' post-verdict motions for judgment amendment or new trial, and (iii) substituting the jury's split findings with its own judgment for defendant; all decided under said paradigm.

Question 2: Notwithstanding Question 1 on legal paradigm propriety, whether the Fourth Circuit court erred in affirming the district court's decision, rendered after having determined that the jury's split findings were inconsistent and not fully supported by the evidence, to reverse finding for plaintiff while allowing finding for defendant to stand, rather than order a new trial.

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Age Discrimination in Employment Act ("ADEA"),
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OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

1. The opinion of the United States Court of Appeals for the Fourth Circuit appears in Appendix F pp 54-59, and is unpublished.

2. The opinion of the United States District Court for the Eastern District of Virginia appears in Appendix D-E pp 44-53, and is unpublished.

3. The opinion of the United States District Court for the Eastern District of Virginia appears in Appendix B-C pp 9-43, and is unpublished

JURISDICTION

This is a petition for review on writ of certiorari of a decision by the United States Court of Appeals for the Fourth Circuit entered on August 6, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

The claims remaining in this case are brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-634.

STATEMENT OF THE CASE

Parties, Claims, and Forum

This action a was brought by Plaintiff-Petitioner, in the federal District Court for the Eastern District of Virginia, Alexandria Division, (Fourth Circuit), under the Age Discrimination in Employment Act ("ADEA")[1], against the Defendant-Respondent, Virginia Polytechnic Institute and State University, who employed Plaintiff as Associate Professor of Computer Science for eight years, and terminated his employment in 1995 at age 55. For the last three years of his employment, Plaintiff's immediate supervisor was Dr. William Frakes ("Frakes"), Program Director at the University's Northern Virginia Center where Plaintiff worked.

The complaint asserted that the Defendant discriminated against Plaintiff because of his age and retaliated against him because Plaintiff engaged in protected conduct opposing discrimination, as manifested in various adverse actions of discrimination and retaliation, including denial of equitable employment conditions, discharge, refusal to rehire, denial of wages, and denial of favorable letters of reference for future employment.

Summary Judgment: The Evidence and Legal Standards

Defendant supported its motion for summary judgment by a memorandum alleging that Plaintiff failed to carry his burden of

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[1] The Complaint contained additional due process and state law claims that were eventually dismissed without prejudice because of the Defendant's Eleventh Amendment immunity as a state agency.

proof according to the burden-shifting scheme of proving discrimination prescribed in *McDonnell Douglas*[2], citing Fourth Circuit case law authorities which require the burden of proving discrimination or retaliation to remain with plaintiff at all times. Plaintiff's opposition memorandum presented direct evidence of the age discriminatory intent of his immediate superiors and decision makers, in the form of documentary statements and oral statements explicitly revealing the ageist animus. One item of documentary direct evidence of age discrimination (entered later into trial evidence) is a letter form Plaintiff's immediate supervisor (Frakes) to the College Dean expressing his desire and intention to hire "young faculty" for the open positions in his Program for the Fall of 1995; to which Plaintiff applied and was refused by Frakes, and an applicant aged 29 was hired instead. This constitutes Plaintiff's complaint claim of "Discriminatory Refusal to Rehire". The complaint also asserted a claim of "Retaliatory Refusal to Rehire" supported by another item of documentary direct evidence of retaliation (also entered into trial evidence): an electronic mail in June 95 from Frakes to the College Dean which directly links the cause of Frakes's unwillingness to hire Plaintiff in the Fall of 1995 to Plaintiff's claiming age discrimination, in which Frakes says:

> It looks like he [Plaintiff] may be planning to claim age discrimination. I need direction from the university about how to proceed. It seems to me that we should, under no circumstances, offer him a teaching position in the fall [of 1995]. (Emphasis added).

The transcript of the hearing on the motion for summary judgment shows that the presiding judge repeatedly characterized documentary direct evidence introduced by Plaintiff as "smoking gun" evidence. (See e. g. *Appendix* page 37, line 17). Numerous

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[2] *McDonnell Douglas Corp. v. Green*, 93 S Ct 1817 (1973).

other oral statements by Plaintiffs supervisors directly evidencing age bias were also presented (See boldface statements in *Appendix* pp 1, 4, 5).

Plaintiff's opposition memorandum also asserted that, because of the availability of direct evidence of the unlawful motive, the *McDonnell Douglas* paradigm advocated by the Defendant is inapplicable to this case, citing the Supreme Court holding in *Thurston*[3]:

> [T]he McDonnell Douglas test is inapplicable where plaintiff presents direct evidence of discrimination. . . . .The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the Plaintiff [has] his day in court despite the unavailability of direct evidence.

Despite the availability of direct evidence of the unlawful motives, the court applied the legal standards of the *McDonnell Douglas* paradigm, maintaining that burden of proof remains with Plaintiff at all times. (This district court in the Fourth Circuit maintained that the burden of proof remains with Plaintiff throughout the adjudication of this case, which is in compliance with the Fourth Circuit law for this case, as elaborated in the Argument Section of this petition). The court decided to dismiss some of Plaintiff's claims, and ordered the case go forward on the remaining discrimination and retaliation claims.

Trial

Throughout the trial, the court adjudicated the case according to the McDonnell Douglas paradigm, sustaining its earlier position at summary judgment, that Plaintiff should bear the burden of proofing "but for" causation at all times, and that the Defendant

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[3] *Transworld World Airlines v. Thurston*, 469 US 121 (S Ct 1985).

should only have the production burden of offering legitimate nondiscriminatory reasons for its adverse actions against Plaintiff. The record shows that at the outset of the trial the court addressed the litigants and the jury on more than on occasion saying: "the plaintiff has the burden of proof ...." The same admonition was repeated in the middle of the trial and at the end. The Fourth Circuit dictates that persuasion remains plaintiff's burden in cases like this one, (see Argument Section).

At the end of the trial the jury findings were mixed. The jurors found unanimously that the Defendant retaliated against Plaintiff on one of the claims but did not find unanimously for him on the other claims[4].

Post-Trial Adjudication

In post trial motions, Plaintiff argued that the court's decisions affecting the verdict, (judgment as a matter of law, amendment of judgment), should be guided not by the McDonnell Douglas standards, but rather by the so-called "same-decision defense" model prescribed by many other circuits, which allocates to the defendant the burden of persuading the trier of the fact that the defendant would have taken the same adverse action against the plaintiff absent the wrongful motive. Plaintiff reasoned to the court that, in addition to the direct evidence of the unlawful intent, the court had a jury finding thereof, and that its post-verdict examination of the evidence should focus on whether the defendant offered and succeeded in a same-decision defense. Plaintiff motioned the court to amend the jury verdict accordingly and find for him on all claims. In the alternative, Plaintiff argued that the

[4] The jurors were not polled on the claims of the verdict.

jury's split findings were inconsistent and not fully (i.e. with respect to all claims) supported by the evidence, which are grounds for ordering a new trial. The Defendant, in support of its motion for judgment as a matter of law, also argued that the jury findings were inconsistent and not fully supported by the evidence, and alleged that Plaintiff did not meet his burden of proof under the McDonnell Douglas scheme. In response to the parties' motions, the court reversed the jury finding for Plaintiff and allowed the finding for the Defendant to stand. In the *Memorandum Opinion* explaining its decision, the court found the jury findings to be inconsistent and not fully supported by the evidence, and renewed its reliance on the McDonnell Douglas burden allocation scheme in judging the parties' evidential tasks. (See *Memorandum Opinion, Appendix* page 52 line 3). The court denied Plaintiff's motion for a new trial.

Appeal

Plaintiff appealed to the Fourth Circuit from the District Courts' orders dismissing with prejudice his due process claims, dismissing on summary judgment some of his ADEA claims, denying his motions to amend judgment or for a new trial, and granting Defendant's post-trial motion for judgment as a matter of law. In an unpublished, unbinding, per curiam opinion, decided on "informal briefs" and without oral arguments, the appeals court affirmed all the decisions of the lower court except for modifying the dismissal of the due process claims to be without prejudice.

REASONS FOR GRANTING WRIT

Reasons for Allowance of Writ on Question 1

The following are the reasons for granting the petition on Question 1 presented for review, stated on page (i):

1. The United States Court of Appeals for the Fourth Circuit has entered a decision in this case based on its legal standard for employment discrimination cases grounded on direct evidence which is (a) inconsistent with a relevant decision of this Court and, (b) in conflict with decisions of most other courts of appeals.

2. The question, at issue in this case, of what legal standard is applicable to single-motive discrimination cases grounded on direct evidence, addressed only in the negative by the *Thurston*[5] Court in 1985, has not yet been settled by this Court.

The forgoing reasons are explained and amplified in the following paragraphs.

The question of legal standards and scenarios for adjudicating employment discrimination cases ("adjudication paradigms") has been an important question of federal law that has generated over the past three and half decades substantial Supreme Court law in such seminal cases as *McDonnell Douglas*[6], *Burdine* [7], and *Hicks*[8] for individual single-motive disparate treatment circumstantial evidence cases; *Teamsters*[9] for pattern and practice,

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[5] *Trans World Airlines Inc. v. Thurston*, 105 S Ct 613 (1985).
[6] *McDonnell Douglas Corp. v. Green*, 93 S Ct 1817 (1973).
[7] *Texas Depart. of Community Affairs v. Burdine*, 101 S Ct 1089 (1981).
[8] *St. Mary's Honor Farm v. Hicks*, 113 S Ct 2742 (1993).
[9] *International Brotherhood of Teamsters v. United States*, 97 S Ct 1843 (1977).

or systemic, cases; *Wards Cove*[10] *and Hazen Paper*[11] for disparate impact cases; and *Price Waterhouse*[12] for mixed motive cases. One scenario that so far has no guiding Supreme Court definitive precedent is that of the individual plaintiff in a single-motive disparate treatment case grounded on direct evidence. Although the Court, in *Thurston*[13], debunked the relevancy of the McDonnell Douglas paradigm to these cases, it did not prescribe the specifics of the applicable legal scenario or delineate the litigants' burdens therein. Several, but not all, circuits have been addressing this question over the past 15 years and developing relevant case law at a relatively slow pace. This is because discrimination cases producing direct evidence of the discriminatory or retaliatory intent are relatively rare, due to the inherent difficulty of proving state of mind, as noted by the Supreme Court in *Aikens*[14]: "there will seldom be 'eyewitness' testimony as to the employer's mental processes." The circuits that have addressed this question are not in full agreement, with notable dissent by the Fourth Circuit, where this case stands. Accordingly, this case is an opportune one for the Court to hear and settle an important question of federal law.

The adjudication paradigm of employment discrimination cases grounded on circumstantial evidence of disparate treatment of individual plaintiffs by a defendant solely motivated by the wrongful animus is governed by the Court's holdings in *McDonnell Douglas*[6], *Burdine*[7] and *Hicks*[8] ("McDonnell Douglas Paradigm"). The Court in *Thurston*[5] held that the McDonnell Douglas formula is

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[10] *Wards Cove Packing Co. v. Antonio*, 109 S Ct 2115 (1989).
[11] *Hazen Paper Co. V. Biggins*, 113 S Ct. 1701 (1993).
[12] *Price Waterhouse v. Hopkins*, 109 S Ct 1775 (1989).
[13] *Trans World Airlines Inc. v. Thurston*, 105 S Ct 613 (1985), an ADEA case dealing with the statute's bona fide occupational qualification defense, and with the matter of liquidated damages.
[14] *U. S. Postal Service Board of Governors v. Aikens*, 103 S Ct 1478, 1482 (1983).

inapplicable where the plaintiff presents direct evidence of the wrongful motive:

> [T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.....The shifting burdens of proof set fourth in McDonnell Douglas are designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.[15]

The *Thurston* Court, however, did not provide guidance on how to adjudicate claims supported by direct evidence, a question not yet settled by the Court. Lower courts had already begun to deal with direct evidence claims before *Thurston* was decided, and many more have done so since. The consensus of the First, Second, Third, Fifth, Seventh, Eight, and Eleventh Circuits (and lower courts in other circuits) is that a defendant confronting a prima facie claim based on direct evidence can avoid liability only if it shoulders the *burden of proving* what is known as the *same decision* defense: that it would have decided on the same adverse action absent the unlawful motive. *Accord Holifield v. Reno*, 115 F 3d 1555, 1561 (11th Cir. 1997); *Bodenheimer v. PPG Industries, Inc.*, 5 F 3d 955, 958 (5th Cir. 1993); *Barbano v. Madison County*, 922 F 2d 139 (2nd Cir. 1990); *Perry v. Kuntz*, 878 F 2d 1054, 1061 (8th Cir. 1989); *Lusardi v. Xerox Corp.*, 855 F 2d 1062 (3rd Cir. 1988); *Fields v. Clark University*, 817 F 2d 931, 936 (1st Circ. 1987); *Bibbs v. Block*, 778 F2d 1318, 1324 (en banc) (8th Cir. 1985); *Blalock v. Metals Trades, Inc.*, 775 F 2d 703 (6th Circ. 1985); *Buckly v. Hospital Corp. of America, Inc.*, 758 F 2d 1525 (11th Circ. 1985); *Lee v. Russell County Board of Education*, 604 F 2d 769, 774 (11th Cir. 1982). Cf. *Mt. Healthy School District v. Doyle*, 429 US 274, 287 (1977).

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[15] *Trans World Airlines, Inc. v. Thurston*, 469 US at 121 (quoting *Loeb v. Textron, Inc.* 600 F2d 1003, 1014 (CA1 1979)).

The Fourth Circuit is perhaps the only court of appeals that prescribes applying the *McDonnell Douglas/Burdine* paradigm in adjudicating single-motive claims supported by direct evidence, a practice in direct conflict with *Thurston*; and does not subscribe to shifting the persuasion burden to the defendant, a position in conflict with the other circuits. In *Mullen*[16], the Fourth Circuit declares:

> [T]his court has employed the Burdine analysis whether a plaintiff brings direct or indirect proof of his claim of discrimination.....Whether the plaintiff attempts to prove intentional discrimination by direct or indirect evidence, "the burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff" (quoting *Burdine*).

In another Fourth Circuit opinion[17], the burden of persuasion remained with plaintiff who introduced direct evidence of discrimination in the form of racial slurs directed at him by decision maker. In yet another opinion, the Fourth Circuit rejects departing from *Burdine* when direct evidence proves the unlawful discrimination:

> [Plaintiff] contends that once she proves by direct evidence that unlawful discrimination was a motivating factor in the employment decision" the defendant must *prove* "that the same decision would have been made absent the determination" (quoting *Fields v. Clark University*, 817 F 2d 931, 937, (1st Cir. 1987). This shifts the burden to the Defendant contrary to *Burdine*.

Dwyer v. Smith 867 f 2d 184 (4th Cir. 1989). Other circuits, heeding the Supreme Court holding in *Thurston*, have held that, in the words of the Eighth Circuit:

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[16] *Mullen v. Princess Ann Volunteer Fire Depart.*, 853 F2d 1130 (4th Cir. 1989).
[17] *Abasiekong v. City of Shelby* 744 F 2d 1055 (4th Cir. 1984).

> If the plaintiff presents no direct evidence of discrimination the [*McDonnell Douglas*] burden shifting analysis is followed. . . . If the plaintiff offers direct evidence of age discrimination, however, the *McDonnell Douglas* analysis is inapplicable (citing *Thurston*). That is, when direct evidence of discrimination exists, the plaintiff need not establish a prima facie case because creating an inference of discrimination is unnecessary.

Bashara v. Black Hills Corporations, 26 F 3d 820 (8th Cir. 1994).

Thus, the decisions of the Fourth Circuit and its district courts, for individual disparate treatment single-motive direct evidence cases, that are based on the *McDonnell/Burdine/Hicks* paradigm prescribed by the Fourth Circuit for such cases, are in conflict with *Thurston* and the decisions of most other circuits. This conflict has existed for about the past 15 years. Considering the substantially diminished legal advantage that the Fourth Circuit paradigm brings to a case compared to the same-decision defense paradigm of the other circuits, and arguing that the Fourth circuit paradigm is improper, a good deal of Fourth Circuit plaintiffs may have been denied substantial rights and suffered injustice, an ongoing practice which can be alleviated by this Court's intervention.

The prejudice to this Petitioner of having to adjudicate his claims so far under the Fourth Circuits paradigm has adversely affected all stages of his litigation: summary judgment, trial, post-trial litigation, and appeal; because the paradigm was used at all stages to guide the courts decisions, in addition to guiding the conduct of the trial. It is well recognized that summary judgement is seldom available for a defendant confronting a plaintiff presenting direct evidence, and may in fact be available instead for the

plaintiff. In this case, Petitioner argues that the District Court erred by applying the McDonnell Douglas paradigm in granting partial summary judgment to the Defendant while acknowledging the "smoking gun" documentary direct evidence of discrimination presented by Plaintiff.

Throughout trial, Plaintiff was substantially prejudiced by the courts' adoption of the same paradigm, prescribed by the Fourth Circuit. In post-trial decisions a court looks to the burdens of the litigants as prescribed by the paradigm, to decide on pre- and post-verdict judgment as a matter of law, verdict viability, judgment amendment, or new trial. In post-trial motions of this case, Petitioner argued that the District Court erred by using the McDonnell Douglas paradigm, despite Plaintiff's motion to the contrary, in assessing the litigants burdens to reach its own decision of substituting the jury's finding for Plaintiff by a judgment for the Defendant. On appeal, the Fourth Circuit Court erred in applying the same paradigm to conclude that Plaintiff failed "to present evidence rebutting Virginia Tech's non-discriminatory explanation for its actions" and "to meet his ultimate burden of showing that Virginia Tech had a retaliatory motive;"[18] when the burden should properly have been shouldered by the Defendant to prove a same-decision defense believable to the judge at summary judgment, to the jury at trial, to the judge in post-verdict decisions, and to the appeals court. Accordingly, this Petitioner argues that he has been prejudiced and denied a substantial right, at every stage, and cumulatively, in the adjudication of his case under the Fourth Circuit paradigm.

[18] See Opinion of the Fourth Circuit, Appendix F pp57-58

Reasons for Allowance of Writ on Question 2

The following are the reasons for granting the petition on Question 2 presented for review, as stated on page (i):

The United States Court of Appeals for the Fourth Circuit has entered a decision in this case sanctioning the lower court's decision which so departs from well established judicial principles with respect to the interrelated issues of inconsistent and evidence-unsupported verdicts, judgment as a matter of law, and new trials; and conflicts with the Fourth Circuit's own precedents; as to call for an exercise of this Court's supervisory power. The forgoing reasons are explained and amplified in the following paragraphs.

Although this question addresses the issues of post-verdict decisions by the District Court and the Fourth Circuit, which were also addressed by Question 1 in relationship to the adjudication paradigm which affected all stages of the litigation of this case; this question presents an independent reason for granting the writ of certiorari. Notwithstanding the argued impropriety of the paradigm, the district and appeals courts still erred in their decisions on the post verdict motions.

The jury returned a split verdict, finding in part for Plaintiff and in part for the Defendant. In post-verdict motions, both parties argued to the court that the jury verdict findings were inconsistent. In its *Memorandum Opinion* on the post trial motions before it, the court determined that indeed the jury findings were inconsistent:

> Moreover, we note that the jury's finding on this claim is inconsistent with its findings of no retaliation on all of plaintiff's other claims. Accordingly, defendant's motion [for judgment as a matter of law] will be granted on this basis. (Emphasis added).

Memorandum Opinion (*Appendix* p 52). It is a well established judicial principle that inconsistent jury findings should not be a basis for granting judgement as a matter of law, and that the proper remedy for inconsistent verdicts is new trial and not judgement as a matter of law. This principle is advocated by the Fourth Circuit. See, e.g. *Atlas Food Systems and Services, Inc. v. Crane National Vendors, Inc.*, 99 F 3d 587 (4th Cir. 1996). This is especially so when the nonmoving party bears the burden of proof, (the Plaintiff in this case, who appeals in Question 1 from the impropriety of this burden allocation).

The impropriety of the court's decision to allow the jurors verdict to stand on some, but not all findings, can be seen from a simple analysis which follows from the Supreme Court holding in *Anderson v. Liberty Lobby Inc.*, 106 S Ct 2505 (1986) about the role of the judge considering a motion for directed verdict by the defendant:

> [The] judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.....The Judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to verdict. (Emphasis added).

Since the judge reversed the unanimous verdict returned by the jurors for the Plaintiff on the evidence presented for one of the claims, the judge must have determined that non of the jurors was fair-minded and reasonable, an unavoidable inference from the Supreme Court's holding in *Anderson*. (Because if there were only one reasonable juror, the unanimous verdict for the Plaintiff would not be returned). Despite this alarming conclusion about the fitness of the jurors to render a just verdict, the judge was willing to allow

their other verdict findings to stand, as stated in the judge's *Memorandum Opinion*: "For these reasons allowing the verdict to stand represents neither a clear error nor manifest injustice." (*Appendix* page 48).

The impropriety of not ordering a new trial in this case is clearly indicated by the Fourth Circuit's own authority in *Wyatt v. Interstate & Ocean Transp Co.*, 623 F 2d 888 (4th Cir. 1980), cited in the court's own *Memorandum Opinion*:

> Alternatively, plaintiff asks the Court for a new trial pursuant to Fed. R. Civ. P. 59(a). The standard governing a district court's consideration of a motion for a new trial was set forth in *Wyatt v. Interstate & Ocean Transp Co.*, 623 F 2d 888 (4th Cir. 1980). In that decision, the Fourth Circuit stated that a trial court may weigh the evidence and consider the credibility of the witnesses, and that it has a duty to set aside a verdict *and* grant a new trial, even if the verdict is supported by substantial evidence, if the court finds that it is against the clear weight of the evidence, based on false evidence, or will result in a miscarriage of justice. See id at 891. (Emphasis added).

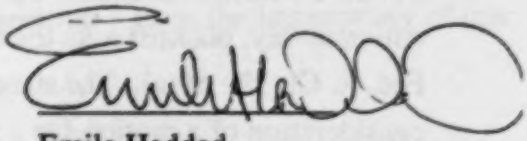
The court acknowledged that it found the verdict not fully supported by the evidence: "[T]he Court finds the evidence did not support the jury's finding [for Plaintiff]" (*Memorandum Opinion*, Appendix p 52), and accordingly it set aside the verdict, but it did not comply with its "duty" to order a new trial as dictated by the Fourth Circuit law.

On appeal, the Fourth Circuit sanctioned the District Court's decision, thereby disregarding its own authority in *Atlas* and *Wyatt*. This represents a notable departure "from the accepted and usual course of judicial proceedings.....as to call for an exercise of this Court's supervisory power." *Supreme Court Rule 10(a).*

CONCLUSION

For all the forgoing reasons, petitioner requests the Court to grant his petition for writ of certiorari.

Respectfully submitted,



Emile Haddad,
Petitioner, *pro se*